Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-732

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

ROBIN HAMPTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

MAURA D. CORRIGAN (P-23557)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5774

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Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward R. Wilson, Chief Appellate Attorney, and Maura D. Corrigan, Assistant Prosecuting Attorney and prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on March 24, 1977, application for leave to appeal denied on August 24, 1977 by the Supreme Court of the State of Michigan.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The order of the Michigan Supreme Court is reported at ____Mich____; ____NW2d ____(1977) and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on March 24, 1977. On August 24, 1977, the Supreme Court of Michigan denied petitioner's application for leave to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), Britt v North Carolina, 404 US 226; 92 S Ct 431; 30 L Ed 2d 400 (1971); Mayer v Chicago, 404 US 189; 92 S Ct 410; 30 L Ed 2d 372 (1971); Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974); and United States v MacCollum, ____US____; 96 S Ct 2086; ____ L Ed 2d ____(1976).

QUESTION PRESENTED

Whether U.S. Const. Am VI and XIV, which guarantee rights to effective assistance of counsel, due process, and equal protection, require a trial court to provide transcripts of every prior criminal proceeding when requested one day prior to trial, without regard to timeliness of the demand, and without regard to frivolousness of the request, where the defendant has already received 2 of 4 prior transcripts?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> ....[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

STATEMENT OF FACTS

After three previous trials of the defendant Robin Hampton had resulted in mistrial, a jury convicted him of felonious assault pursuant to MCLA 750.82. The underlying facts revealed that the defendant approached the victim Joan Niederstadt at gunpoint as she entered her car in the Eastland Shopping Center parking lot, and ordered her from her car. The proofs revealed that defendant had robbed another victim of her car in the Northland Shopping Center parking lot approximately one and one-half hours earlier. He drove that victim's stolen car to the crime scene. Instead of submitting, Ms. Niederstadt escaped in her automobile, reported the matter to Eastland security, and returned with the security guard in time to obtain the license number of the stolen car. Defendant was arrested approximately one hour later in the described car.

At the outset of trial, defense counsel made seriatim but contradictory motions. Initially, he argued that the double jeopardy clause precluded retrial after prior juries were unable to agree where all previous juries had heard "substantially the same evidence." He also renewed an adjournment request, denied the previous day by the presiding judge (who heard all motions for adjournment made on the day set for trial) because of the unavailability of the defense attorney from his office who had represented defendant in the previous trials. He next requested an adjournment of the trial because he sought production of transcripts of the first and third mistrial.

The trial court in declining the requests first noted the procedural defects in the motions. First, local rule required that mistried causes be set for retrial as soon as possible. Local rule further required that motions for adjournment be made 10 days before the scheduled retrial, and not one day before or on the day set for trial. No adjournment for absence of counsel or trial transcripts had been requested 10 days before, at the close of the previous trial.

The Court denied the request for all prior transcripts. The most recent trial transcript could not be supplied because of the lack of time. Further, prior mistrials occurred for reasons unrelated to the strength of the evidence. For example, the Court mistried one case after it learned that one empanelled juror had been convicted of the same offense for which defendant stood trial. Another mistrial resulted after the jury was hung 11-1 for conviction. In that case, the dissenting juror had been arrested in a drug raid, allegedly assaulted by police, and refused to believe the testimony of police officers. Moreover, the Court heard the testimony of the victim and the similar acts witness, and found it short, straightforward, and consistent in each prior trial. The Court also indicated that it would have granted the request if the testimony had been equivocal or weak in any way.

Counsel conceded he had reviewed previous defense counsel's notes and transcripts of the examination and second trial, but argued he would be further aided in impeachment attempts by transcripts of the first and latest trials.

The prosecutor argued that the simplicity and brevity of testimony in all the prior trials, and the lack of delay preceding retrial were appropriate factors in considering the adequacy of the impeachment tools already available to defense counsel.

The trial court succinctly ruled:

> THE COURT: I appreciate what the Glass case said and what you are saying. But we have to use also some reason and common sense in connection with these trials and rulings.
>
> This case was a short trial. It was a comparatively simple trial. We have the examination testimony, you have the complete transcript of the second trial, requested by the defendant, and adjournment was granted for that purpose. The third trial again repeated that which was in the second trial. We are commencing the trial. Mr. Rutledge was aware of that the following Monday, which was the first trial date after the mistrial, and the Court can see no further reason for delay, no reason for the subsequent transcript. Therefore I will deny your motion. (T 11-12)

Respondent's conviction was reversed by a three-judge panel of the Michigan Court of Appeals on March 24, 1977. The Court cited People v Glass, 38 Mich App 75 (1972), which relied on Britt v North Carolina, 404 US 226; 92 S Ct 431; 30 L Ed 2d 400 (1971) to hold that the defendant was entitled to a copy of all transcripts of every prior proceeding because defendant was represented by a different lawyer employing a new strategy. The Court also held that the length of the trial under scrutiny governed the request. (Appendix A)

On August 24, 1977, the Michigan Supreme Court denied the petitioner's application for leave to appeal the Court of Appeals decision, because it was not persuaded that the question presented should be reviewed by the Court. (Appendix B)

REASONS FOR GRANTING THE WRIT

The issue posed presents a substantial federal constitutional question, involving application of recent cases of this Court, which petitioner submits have been clearly misconstrued and misapplied by the Michigan Court of Appeals.

The opinion of the Michigan Court of Appeals relied on People v Glass, 38 Mich App 735 (1972), which applied Britt v North Carolina, supra, to find that the State was obliged to provide an indigent defendant with a transcript of a prior mistrial because it was needed to present an effective defense. The Court there, citing Britt, stated that the value of a prior mistrial transcript can ordinarily be assumed, both as a discovery device and impeachment tool. In Glass, the criminal defendant had moved for the production of the transcript shortly after the declaration of the mistrial. Three months elapsed before the Court denied the motion, and forced the defendant to trial without it.

Britt v North Carolina, supra, did not require the production of even one prior transcript, where the defense counsel stipulated to access to an adequate alternative, i.e. a court reporter who would willingly have reread notes from the first trial. In Mayer v Chicago, 404 US 189; 92 S Ct 410; 30 L Ed 2d 372 (1971) this Court noted that where a colorable need for a complete transcript exists, the burden is on the state to show that only a portion of the transcript or an alternative will suffice for an effective appeal. However:

> "We conclude that appellant cannot be denied a 'record of sufficient completeness' to permit proper consideration of his claims. We repeat that this does not mean that he is automatically entitled to a full verbatim transcript."
>
> Mayer v Chicago, 404 US 189, 198; 92 S Ct 410, 416; 30 L Ed 2d 372 (1971).

Petitioner herein contends the State of Michigan met its burden to show adequency of the tools supplied. In the instant case, the State complied with Roberts v LaVallee, 389 US 40; 88 S Ct 194; 19 L Ed 2d 41 (1967) by providing respondent with a preliminary examination transcript. Additionally, respondent had a full verbatim transcript of the second trial for discovery and impeachment purposes. He did not move for production of the first trial transcript until the day before the instant trial commenced. His failure to request transcripts of the first trial earlier could be construed as a waiver. The defendant did not seek the transcript of the third mistrial until the day before trial, although he should have sought it at the close of the third trial in order to preserve his procedural rights under the local court rule.

Since Britt v North Carolina, supra, was decided, this court has refined its interpretation of the due process and equal protection rights of indigents at stake in the trial and appellate process. Ross v Moffitt, 417 US 600; 94 S Ct 2437; 41 L Ed 2d 341 (1974), further defined the extent of the Britt-Griffin-Douglas due process and equality principles regarding aids to effective assistance of counsel. The Court emphasized that due process invokes consideration of fairness between the individual and the state, regardless of others' treatment, while equal protection emphasizes disparity between arguably indistinguishably situated classes of citizens. The Court noted that while it is the tendency of all rights to declare themselves absolute to

their logical extreme, the equal protection clause has some limits. It does not require precisely equal advantage or absolute equality. Ross v Moffitt, supra. Moreover, according to Ross v Moffitt, due process would be violated only if the state singled out indigents and denied them meaningful access to the appellate system due to poverty. Here, defendant had already been provided with "meaningful access;" he had impeachment and discovery tools furnished him from 2 of 4 prior proceedings. In no sense did the State deny him access to transcripts due to poverty, but due to lack of timeliness and the availability of other verbatim transcripts for discovery and impeachment.

Similarly, Ross v Moffitt, supra, would not require the Court to provide every transcript of every previous proceeding to accord defendant a right to equal protection merely because the service might benefit an indigent. Rather, the equal protection clause requires that the state provide an accused an adequate opportunity to present his claims fairly. With 2 of 4 prior transcripts, the respondent had an adequate opportunity to present his claims fairly. In United States v MacCollom, ___US___; 96 S Ct 2086; ___L Ed 2d ___(1976) this Court broadly noted that this principle applied in the context of a criminal proceeding, without reference to trial or appellate stages. The Court held that a district court judge's certification that the transcript sought for a collateral attack was necessary and the suit non-frivolous satisfied the equal protection guarantee. The trial court here ruled that the two additional transcripts were unnecessary in light of the transcripts already furnished defendant, because the testimony of the two lay witnesses adduced in each one day prior mistrial was the same. The judge said he would have readily granted the requests if the prior mistrials related in any way to weakness in the evidence. The trial judge apparently viewed additional transcripts as speculative in value and devoid of real assistance to the defendant. Neither due process nor equal protection required the judge to do more.

In Bounds v Smith, ___US___; 97 S Ct 1491; ___L Ed 2d ___(1977), Justice Marshall, for the majority, noted that the only cases rejecting indigent claims to transcripts have resulted from the availability of an adequate but unused alternative, citing Britt v North Carolina, supra, or from the waiver of a prior opportunity to obtain a transcript and the frivolousness of the present request. In fact, in the instant case, adequate alternatives for impeachment and discovery were available: 2 of 4 prior transcripts. Moreover, as in MacCollom, the defendant's lack of procedural compliance can fairly be construed as waiver of those transcripts, and the purpose in seeking them appears as a delaying tactic, rather than promoting any real discovery or impeachment. Petitioner contends that this case can properly be categorized within Britt's narrow exception. No longer could additional discovery or impeachment value be assumed because defendant had other transcripts, and because the testimony in all prior cases had been short, simple, and straightforward. U.S. v Jonas, 540 F2d 566(7 Cir, 1966).

Petitioner respectfully contends that Michigan accorded the defendant his constitutionally guaranteed rights to due process, equal protection, and effective assistance of counsel by supplying some prior transcripts, and asks to be relieved of the consequences of the Michigan Court of Appeals decision which have declared rights absolute to their logical extreme.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan Court of Appeals is in conflict with the principles set forth in recent cases of this Court, and petitioner respectfully requests that plenary review be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney

Maura D. Corrigan

By: MAURA D. CORRIGAN (P-23557)
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5774

MDC:do

Dated: November 16, 1977.

APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS

(People of the State of Michigan v Robin Hampton)

(No. 26847)

(Filed March 24, 1977)

Before: N. J. Kaufman, P.J., and V.J. Brennan and M. D. O'Hara, JJ.

Per Curiam

Defendant appeals from a verdict by a jury in Wayne County Circuit convicting him of felonious assault, in violation of MCLA 750.82; MSA 28.277. Counsel for the defendant have strongly contended in this appeal that the case has numerous errors entitling defendant to reversal. We are of the view that one issue is dispositive and, therefore, reverse.

Though we reverse, our disposition herein cannot be satisfactorily understood without reference to the posture of events below. Defendant has now faced trial on this same charge on four occasions. All four trials occurred during a three month period. The first three trials resulted in hung juries. In the instant trial, the jury deliberated four days before rendering its verdict.

Throughout the course of these proceedings, defendant has been represented by the Legal Defenders Office. At the time of the fourth trial, the attorney who had represented defendant in the first three trials was unable to participate. An adjournment was requested to allow time for the original attorney to handle the fourth trial. The motion was denied. As a result, new counsel from the defender's office was brought in to handle the trial.

Prior to the fourth trial, defendant's new counsel requested the trial transcripts of the first and third trials. This was sought despite the fact that the defendant had been previously provided with copies of the preliminary examination and second trial transcript. His request was premised upon People v Glass, 38 Mich App 735; 197 NW2d 140 (1975). At the time of this request he stated:

> "I would submit to the Court that perhaps discovery is not the main thrust in this motion, it is impeachment. You have a situation where you have two eye witnesses, and at the time of the trial they decide to bring in the second eye witness, considering the witness was going to testify to the modus operandi of my client. I submit theimpeachment is of the utmost importance. That is what the case is all about, eye witness testimony. If ever there was a situation where impeachment possibility is available, it should be made available. You have a long trial, and you get mixed up with a secondary issue, and in this case eye witness identification. That is what we need it for."

The trial judge reached a result contrary to defendant's position on the basis of essentially the following facts:

> "This case was a short trial. It was a comparatively simple trial. We have the examination testimony, you have the complete transcript of the second trial, requested by the defendant, and adjournment was granted for that purpose. The third trial again repeated that which was in the second trial."

Again, as in the court below, defendant contends that the trial judge's denial of the transcripts was error. We agree.

In Glass, the Court held that an indigent criminal defendant was entitled to a transcript of his first trial at state expense prior to a new trial, even though he was represented by the same lawyer at both trials. In reaching this result, Judge, now Justice, Levin quoted approvingly the following language from Britt v North Carolina, 404 US 226, 228; 92 S Ct 431; 30 L Ed 2d 400 (1971):

> " 'We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. As Mr. Justice Douglas makes clear, even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.' (Emphasis supplied)." 38 Mich App at 738-739.

We think Glass governs our result here. It is, of course, true that the instant case differs from Glass in that all of the trials occurred within a three month period. Moreover, defendant was given copies of the second trial and the preliminary examination transcripts prior to the third trial. But, by the same token, there are dissimilarities which suggest that the need was even greater than in Glass.

In the instant case, defendant was now being represented by different counsel. We do not overlook or minimize the consideration that he was from the same office as original counsel. But this hardly suffices to let him delve into the inconsistencies in a witness' prior testimony. He was not dealing with a faulty memory of earlier trials but, rather, he was dealing without the benefit of any recollection.

The transcripts provided did not rectify this deficiency. This attorney employed a strategy quite different from that of his predecessor. For example, this this was the first time defendant testified in his own behalf.[1] Thus, based upon this alteration of trial tactics, various aspects of earlier testimony on the part of the witnesses could become crucial to defendant's defense. Obviously, without the benefit of the other transcripts, the defendant would be unable to discern the inconsistencies in the prior testimony of the witnesses.

Finally, it is also urged by the prosecutor that this was a relatively simple case and the transcript was unnecessary to defendant's defense. The record belies this assertion. We have a voluminous transcript in the instant case. As was noted previously, there were three prior hung juries. The fourth jury deliberated four days before reaching a verdict. As the trial judge stated in rejecting defendant's assertion that four days of deliberation amounted to coercion to reach a verdict:

1

We note that the defendant testified because the trial judge suppressed any references to his prior criminal record. See People v Jackson, 390 Mich 621; 212 NW2d 918 (1973).

> "It has been a very lengthy trial, the evidence is voluminous, extensive cross examination; and in actuality the time used by the jury to this point, relatively speaking, has not been a long time to deliberate on everything that has gone into this record."

For the above-stated reasons, we reverse and remand.

APPENDIX B

ORDER OF THE MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of August in the year of our Lord one thousand nine hundred and seventy-seven.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

State of Michigan—ss.

I. Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 24th day of August in the year of our Lord one thousand nine hundred and seven-seven.

/s/ Corbin R. Davis,
Deputy Clerk